IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5364

GERALD J. VERVILLE, Administrator of the Estate of Hilma Verville, Deceased,
Petitioner,

vs

BOTSFORD GENERAL HOSPITAL, a Michigan corporation, ARNOLD L. FINN, D.O. and MORRIS E. LIEBERMAN, D.O., jointly and severally,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED FOR REVIEW

WHETHER ANY OF THE PROCEDURES HERE FOLLOWED IN THE COURTS OF THE STATE OF MICHIGAN UNDER THE STATUTES OF THE STATE OF MICHIGAN ARE REPUGNANT TO THE CONSTITUTION TREATIES OR LAWS OF THE UNITED STATES OR DENIED PETITIONER ANY CONSTITUTIONAL RIGHTS.

Concise Statement of the Case

Petitioner brought a civil action as administrator of the Estate of Hilma Verville, Deceased, in the Circuit Court for the County of Wayne, State of Michigan on or about February 3, 1971. Trial was commenced in this cause on May 1, 1973 before the Honorable Michael Stacey, Judge of the Circuit Court for the County of Wayne, State of Michigan. On May 3, 1973, an agreement was reached as to settlement of the cause and petitioner stated on the record of the trial court that the settlement was acceptable to him both in his individual capacity and as Administrator of said Estate. An Order of Dismissal (Appendix I), was entered on May 3, 1973 as approved by petitioner, petitioner's counsel and respondent's counsel. The amount agreed to in the settlement agreement was paid over to the petitioner.

The petitioner subsequently filed an Application for Delayed Leave to Appeal with the Michigan Court of Appeals. That application was denied, the Court stating in pertinent part:

> "It is ordered that the application be, and the same is hereby denied without prejudice to plaintiff's right to seek relief in the trial court under the provisions of GCR 1963, 528.3." (Appendix II.)

The petitioner then filed Application for Delayed Leave to Appeal with the Michigan Supreme Court. That application was denied.

At no time has petitioner sought the relief recommended by the Michigan Court of Appeals nor has he ever tendered back the funds which he accepted in settlement.

ARGUMENT

U.S.C.A. 28, Section 1257(3) states:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
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> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c.646, 62 Stat. 929."

Petitioner has couched his petition in vague terms declaring on the basis of certain alleged acts of hypnotism and subliminal influence that he was denied his constitutional rights.

Petitioner has not exhausted his remedy under the Michigan General Court Rules, Rule 528.3 which states:

".3 *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under sub-rule 527.2; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of a judgment. The motion shall be made within a year after the judgment order or proceeding was entered or taken. A motion under sub-rule 528.3 does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in sub-rule 528.2 above, or to set aside a judgment for fraud upon the court. Writs of *coram nobis, coram vobis, audita querela* and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

Nowhere in his petition, does he state with any specificity the provisions of Michigan Statutory Law or procedure which he deems repugnant to the Constitution, treaties or laws of the United States. The parties seeking review in the United States Supreme Court must show that it (the Supreme Court) has jurisdiction of the case. *Department of Mental Hygiene of California v. Kirchner,* 380 U.S. 194, 85 Supreme Court 871, 13 Lawyers Edition 2d, 753. The policy against premature constitutional adjudications demands that any doubts in maintaining appellant's burden of establishing the United States Supreme Court's jurisdiction be resolved against jurisdiction. *Republic Natural Gas Co. v. State of Oklahoma,* 334 U.S. 62, 68 Supreme Court 972, 92 Lawyer's Edition, 1212. Without showing to this Court the repugnance to the Constitution, petitioner fails to state a federal question. The United States Supreme Court will not review judgments of State Courts that rest on adequate independent state grounds. *Dixon v. Duffy,* 342 U.S. 33, 72 Supreme Court 10, 96 Lawyer's Edition 46.

CONCLUSION

Petitioner has not exhausted his state remedies nor has he shown the repugnancy of any state statute to the Constitution, treaties or statutes of the United States nor has he presented any substantial federal question. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DICE, SWEENEY and SULLIVAN, P.C.
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APPENDIX No. I

Gerald J. Verville, Administrator of The Estate of Hilma Verville, Deceased,
Plaintiff-Appellant,
vs
Botsford General Hospital, a Michigan corporation, Arnold L. Finn, D.O. and Morris E. Lieberman, D.O., Jointly and Severally,
Defendants-Appellees.

No. 18577
L.C. # 173 910

ORDER DENYING APPLICATION FOR DELAYED APPEAL

At a session of the Court of Appeals of the State of Michigan, held at the Court of Appeals in the City of Detroit, on the seventeenth day of December in the year of our Lord one thousand nine hundred and seventy-three.

Present the Honorable John H. Gillis, presiding Judge, Vincent J. Brennan, Michael D. O'Hara, Judges.

In this cause an application for delayed appeal is filed by plaintiff-appellant, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

It is Ordered that the application be, and the same is hereby denied without prejudice to plaintiff's right to seek relief in the trial court under the provisions of GCR 1963, 528.3.

State of Michigan—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 19th day of December in the year of our Lord one thousand nine hundred and seventy-three.

/s/ Ronald L. Dzierbicki,
Clerk.

APPENDIX No. II

ORDER DENYING DELAYED APPLICATION FOR LEAVE TO APPEAL

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room in the City of Lansing, on the 1st day of August in the year of our Lord one thousand nine hundred and seventy-four.

Present the Honorable Thomas M. Kavanagh, Chief Justice, Thomas G. Kavanagh, John B. Swainson, G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, Associate Justices.

On order of the Court, the delayed application in pro per for leave to appeal is considered, and the same is hereby denied, because the appellant has failed to persuade the Court that the question presented should be reviewed by this Court.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 1st day of August in the year of our Lord one thousand nine hundred and seventy-four.

/s/ Harold Hoag,
Deputy Clerk.